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No. 99-2036

IN THE

Supreme Court of the United States

THE GOOD NEWS CLUB, *et al.*,
Petitioners,

v.

MILFORD CENTRAL SCHOOL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS*

Solidarity Center for Law and Justice, P.C. is a professional corporation organized under the laws of the State of Georgia for the promotion of social welfare by defending human and civil rights secured by law, to wit: those individual liberties, freedoms, and privileges involving human dignity that are either specifically guaranteed by the U. S. Constitution or by

* Counsel for the *amicus curiae* authored the brief in its entirety. No person or entity other than the *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of the brief.

a special statutory provision coming directly within the scope of the 13th or 14th Amendment, some other comparable constitutional provision, or that otherwise fall within the protection of the Constitution by reason of their long established recognition at the common law as rights that are essential to the orderly pursuit of happiness by free men and women. When permitted by court rules and practice, Solidarity Center for Law and Justice, P.C. files briefs as *amicus curiae* in litigation of importance to the protection of human and civil rights, particularly when the primary right of parents to direct the upbringing of their children in accordance with the dictates of their consciences is at issue.

The preferential public school access granted under Respondent's Community Use Policy to youth organizations that train children in deeply held moral or ethical beliefs about what are right or wrong attitudes and behaviors tends to establish a civic religion. The United States Court of Appeals for the Second Circuit decided that it was permissible for Respondent to distinguish between youth organizations that teach moral and character development from a "religious viewpoint" and youth organizations, like the Good News Club, that teach moral and character development through "religious instruction and prayer." This Court should reverse the Second Circuit's decision in favor of Respondent and insist that Respondent adopt a policy that respects the private, independent childrearing decisions of all parents, regardless of the particular deeply held moral, ethical, or religious belief system they use to form their children.

Counsel of Record for the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

SUMMARY OF ARGUMENT

Since early in United States history, constant attention has been paid to the important task of indoctrinating children in attitudes and beliefs that are deemed essential to the maintenance of a peaceful and productive democracy. The Establishment Clause of the First Amendment to the U.S. Constitution was designed to safeguard against government officials undertaking to dictate what "shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). States may not go beyond the teaching of civic knowledge and skills to the actual teaching of civic virtues that "stand on a right of self-determination in matters that touch individual opinion and personal attitude." *Id.*, 319 U.S. at 631.

What public school officials cannot do lawfully through the direct indoctrination of students during the school day cannot be done indirectly by providing preferential access to their school facilities for the training of children in a generally moral or ethical, as opposed to a specifically religious, belief system. The government may not establish "an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

In the present case, pursuant to a Community Use Policy that expressly forecloses the use of public school facilities for religious purposes, Respondent granted access to youth organizations, such as the Boy Scouts, Girls Scouts, and 4-H Club, to engage in "pure" moral and character development through "the discussion of secular subjects from a religious viewpoint." *Good News Club et al. v. Milford Central School*, 202 F.3d 503, 510 (2nd Cir. 2000) *cert. granted*, 121 S. Ct. 296 (2000). On the other hand, Respondent denied access to Petitioners to engage in Christian moral and

character development through "the discussion of religious material through religious instruction and prayer." *Id.* The United States Court of Appeals for the Second Circuit upheld this disparate treatment because the Christian viewpoint espoused by Petitioners "contains an additional layer" that makes "the activities of the Club fall clearly on the side of religious instruction and prayer" that could not be endorsed under the Policy. *Id.*

Based on past decisions of this Court regarding to what extent purely moral or ethical belief systems qualify as religions in the traditional sense, the distinction made by the Respondent and the Second Circuit between the religious nature of the two approaches to the moral and character development of children was erroneous. The training of children in deeply held moral or ethical beliefs about what is right and wrong is as religious in the traditional sense as the training of children in Christian moral or ethical beliefs on the same subject. *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970) Regardless of whether they are taught from a "pure" or Christian viewpoint, such moral or ethical beliefs serve as the first principles of an ultimate reality that can have the effect of motivating children to adopt attitudes and conduct their lives in accordance with such beliefs. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 835-837 (1995)

Respondent's granting of access under the Community Use Policy to youth character and leadership development organizations that indoctrinate children in a moral or ethical religion unconstitutionally tends to establish a civic religion. Such a policy has the further effect of placing Petitioner's Christian faith at a competitive disadvantage in the formation of children relative to the various humanist religions advocated by influential statesmen, social scientists, education philosophers, and theologians throughout American history.

To remedy this injustice, this Court should insist that Respondent adopt a Community Use Policy that respects the principle of neutrality among religions and safeguards the private, independent choices of parents to have their children educated for democratic participation in a accordance with the dictates of their consciences. Petitioners should be granted access to Respondent's school facility to train children in the context of the Christian religion on equal terms with youth organizations that train children in the context of deeply held moral or ethical beliefs.

ARGUMENT

I. YOUTH DEVELOPMENT ORGANIZATIONS THAT TRAIN CHILDREN TO ADOPT DEEPLY HELD MORAL OR ETHICAL BELIEFS ABOUT WHAT IS RIGHT AND WRONG ARE ENGAGED IN THE PRACTICE OF A RELIGION.

Prior decisions of this Court provide a basis for determining whether youth development organizations that train children through the "discussion of secular subjects from a religious viewpoint" are, in fact, engaged in the practice of a religion. See *United States v. Seeger* 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). The precedent established by these cases make it clear that the pursuit of youth character and leadership development in the context of deeply held moral or ethical beliefs about what is right and wrong constitutes a religion.

A. Moral or ethical beliefs about what is right and wrong that are held with the strength of traditional religious convictions qualify as religious in the traditional sense.

During the Vietnam War, this Court examined the military service exemption claims of conscientious objectors who did

not belong to an orthodox religious sect. Section 6(j) of the Universal Military Training and Service Act exempted from combatant service in the armed services those who were conscientiously opposed to participation in war by reason of their religious training and belief. 50 U.S.C. App. 456(j) (1958 ed.) The Act defined the term "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but not including essentially political, sociological, or philosophical views or a merely personal code." *Seeger*, 380 U.S. at 165.

In *Seeger* this Court included within the scope of the term "religious training and belief" Seeger's "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." *Seeger* 380 U.S. at 166. Seeger cited such personages as Plato, Aristotle and Spinoza as support for his ethical belief in intellectual and moral integrity "without belief in God, except in the remotest sense." *Id.* His belief was found to be sincere, honest, and made in good faith; and his conscientious objection to be based upon individual training and belief, both of which included research in religious and cultural fields.

Five years later, in *Welsh* this Court determined that Welsh was entitled to conscientious objector status. Unlike Seeger, who, in filling out his conscientious objector application, had put quotation marks around the word "religious," Welsh struck the word "religious" out entirely and later characterized his beliefs as having been formed "by reading in the fields of history and sociology." *Welsh*, 398 U.S. at 341.

This Court determined that Welshshould be granted an exemption because, although his moral and ethical views did not qualify as "religious" in the traditional sense, they were "held with the strength of traditional religious convictions." *Id.*, 398 U.S. at 342.

B. Moral or ethical beliefs are deeply held when they function as a religion in the life of the believer by imposing a duty of conscience to do what is right and to refrain from doing what is wrong.

The main purpose of the conscientious objector cases was to determine whether individuals who adhered to purely moral or ethical belief systems could satisfy the statutory requirement of having a "belief in a relation to a supreme Being involving duties superior to those arising from any human relation." In the cases where an objector did not believe in God, this Court examined the circumstances under which a moral or ethical code could constitute a force, parallel to a belief in God, that would preclude participation in the war.

This Court determined that deeply held moral or ethical beliefs occupy in the life of an individual a place parallel to that filled by God in cases where such beliefs impose upon the individual a duty of conscience to do what is right and to refrain from doing what is wrong. *Welsh* 398 U.S. at 340. In such instances, the moral or ethical beliefs serve as the first principles of an ultimate reality to which the holder of such beliefs aspires. *Rosenberger* 515 U.S. at 837.

Youth character and leadership development organizations that train children to embrace a moral or ethical ultimate reality to guide their lives are no less religious in the traditional sense than a Christian religious organization that advocates or rests upon a belief in a deity. Thus, in *Rosenberger* this Court indicated that a college policy that prohibited the use of student fees in support of a Christian organization likewise would have to prohibit the use of student fees in support of "essays by hypothetical student contributors named Plato, Spinoza, and Descartes" who believed in a non-theistic ultimate reality. *Rosenberger* 515 U.S. at 837-838. One of America's leading educators and

humanists, John Dewey, explained how a moral or ethical ideal could substitute for God:

> Suppose for the moment that the word "God" means the ideal ends that at a given time and place one acknowledges as having authority over his volition and emotion, the values to which one is supremely devoted . . . these ends, through imagination, take on unity. . . . Whether one gives the name "God" to this union, operative in thought and action, is a matter of individual decision. But the *function* of such a working union of the ideal and actual seems to me to be identical with the force that has in fact been attached to the conception of God in all the religions that have a spiritual content; and a clear idea of that function seems to me urgently needed at the present time.

J. Dewey, *A Common Faith*, 29, 35 (1934).

C. The moral and ethical beliefs of youth development organizations such as the Boy Scouts of America, Girl Scouts, and 4-H Club are deeply held.

Respondent has granted access under the Community Use Policy to local chapters of the Boy Scouts, Girl Scouts, and 4-H Club for the secular purpose of offering youth character and leadership development training. The main goals of these organizations are to promote "personal growth and development of leadership skills" (Boy Scouts), encourage young women to vow to "try . . . [t]o serve God and [their] country" (Girl Scouts), and help "to enable youth to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults" (4-H Club). *Good News Club*, 202 F.3d 503, 511 (2nd Cir. 2000). These goals evidence the fact that these organizations train children in the context of deeply held moral and ethical beliefs that are an express, integral, and long-standing part of their respective youth development programs.

Even if one ignores the fact that it would be impossible to train a Girl Scout to "serve God" without providing her religious instruction about God and what God expects from us, the purely moral and ethical beliefs expressed by the Girl Scouts program serve as an ultimate reality, parallel to belief in a deity, to which Girl Scouts are trained to aspire. These deeply held moral and ethical beliefs are reflected in the four program goals of the Girl Scout Program: developing self-potential, relating to others, developing values,[1] and contributing to society.

The Boy Scouts of America ("BSA") is a private, nonprofit organization. The mission of the Boy Scouts is "to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." *Boy Scouts of America et al. v. Dale*, ____ U.S. ____, 120 S.Ct. 2446, 2451-2452 (2000) To instill its shared values, BSA has adopted a "Scout Oath" and a "Scout Law" setting forth its central tenets.

The Scout Oath requires a member to pledge: "On my honor, I will do my best, To do my duty to God and my country and obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight." The Boy Scout Handbook defines "morally straight," in the following manner:

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[1] The details pertaining to the Girl Scout program goal of "developing values" include:

> Girls will develop a meaningful set of values to guide their actions and to provide for sound decision-making. Girl Scouting will: Help girls develop meaningful values and ethics that will guide their actions. Foster an ability to make decisions that are consistent with girls' values and that reflect respect for the rights and needs of others. Encourage girls to reexamine their ideals as they mature.

Girl Scouts USA, *The Girl Scout Program* (2000). *See* http://www.gsusa.org/about/tgsp.html

> To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

Boy Scouts of America et al., 120 S.Ct. at 2461.

Although BSA bylaws state that it is "absolutely nonsectarian in its attitude toward . . . religious training," Christian New Testament virtues serve as the foundation of the virtues comprising the Scout Law. The BSA strive to instill the following values in their members: trustworthy, obedient, loyal, cheerful, helpful, thrifty, friendly, brave, courteous, clean, kind, and reverent. The linkage between the Scout Law values and the Christian religion is evidenced by the publication by the BSA Editorial Board, early in the history of the American Boy Scout movement, of an official BSA edition of the New Testament. W. Murray, *Boy Scouts of America New Testament* (Est. 1925) The BSA New Testament included a listing of New Testament scriptures specifically relating to the twelve Scout Law virtues.[2]

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[2] The BSA New Testament sets forth the correlation between Boy Scout ultimate values and New Testament scripture in the following manner:

NEW TESTAMENT SCRIPTURES ON SCOUT LAW

A SCOUT IS TRUSTWORTHY Matt. 25: 14-30. Acts 5: 1-6
A SCOUT IS LOYAL Rom. 13: 1-7. Rev. 3: 7-13
A SCOUT IS HELPFUL Acts. 27: 27-44. Matt. 25: 34-36
A SCOUT IS FRIENDLY Mark 10: 46-52. Luke 10: 25-37
A SCOUT IS COURTEOUS Luke 7: 36-50. Luke 17: 11-19
A SCOUT IS KIND Luke 15: 1-7. Heb. 13: 1-6
A SCOUT IS OBEDIENT Matt. 4: 18-22. Matt. 7: 24-27
A SCOUT IS CHEERFUL Matt. 5: 1-12. Phil. 4: 10-20
A SCOUT IS THRIFTY John 6: 12-14. 1 Tim. 6: 17-19
A SCOUT IS BRAVE 2 Tim. 4: 5-8. Luke 22: 54-62

The religious roots of the stated missions and values of the Boy Scouts, Girl Scouts, and 4-H Club, the solemnity with which they are subscribed to by their organizational leaders and participants, the time and personal sacrifices that must be made to successfully participate in these programs, the personal bonds between group participants, and the overriding institutional concern for training children to be strong in ideals and character provide overwhelming evidence that the moral and ethical beliefs of these organizations impose a duty of conscience to do good and refrain from doing wrong. For this reason, the beliefs of these organizations function as a religion in the lives of their members and are deeply held from an Establishment Clause perspective.

II. GRANTING PUBLIC SCHOOL ACCESS TO YOUTH DEVELOPMENT ORGANIZATIONS FOR THE MORAL OR ETHICAL TRAINING OF CHILDREN WHILE DENYING ACCESS TO YOUTH DEVELOPMENT ORGANIZATIONS FOR THE CHRISTIAN RELIGIOUS TRAINING OF CHILDREN UNCONSTITUTIONALLY TENDS TO ESTABLISH A CIVIC RELIGION.

The first clause in the First Amendment to the Federal Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions. "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state]

A SCOUT IS CLEAN Matt. 5: 27-32. James 1: 19-27
A SCOUT IS REVERENT Phil. 2: 1-11. 1 Cor. 8: 1-13

religion or religious faith, or tends to do so.'" *Lee v. Weisman* 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

A. Granting access to youth development organizations for the training of children based on deeply held moral or ethical beliefs while denying petitioners equal access for the training of children based on deeply held Christian religious beliefs has a primary effect of advancing religion.

Respondent must not discriminate against Petitioners on the basis of their deeply held Christian religious beliefs about the secular subject of youth character and leadership development. For Respondent to continue to do so has an impermissible primary effect of advancing the religion of organizations that teach youth character and leadership development in the context of deeply held moral or ethical beliefs.

(a) *The preferential access granted under the Community Use Policy to organizations that teach youth character and leadership skills in the context of deeply held moral or ethical beliefs results in the governmental indoctrination of children in an ethical religion.*

This Court has acknowledged "that public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system." *Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (plurality) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). The legal fact remains, however, that public schools cannot be used to indoctrinate children in what the government, from time to time, considers as the moral or

ethical values that are essential to realizing the ultimate democratic reality. "The State may require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 631 (1943) (quoting *Minersville School District v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, C.J., dissenting)). Nevertheless, the state may not go beyond the teaching of civic *knowledge* and *skills* to the actual teaching of civic *virtues* that "stand on a right of self-determination in matters that touch individual opinion and personal attitude." *Barnette*., 319 U.S. at 631.

Ignoring the limitations expressed by this Court in *Barnette*, many of America's public school districts either have begun to teach moral or ethical values throughout the school day or have begun to grant access to their school facilities to youth development organizations for the purpose of training students in the attitudes and behaviors that will make them "good" democratic citizens.[3]

"A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee v. Weisman*, 505 U.S. at 592. In *Lee*, this Court struck down a public school graduation ceremony policy that had permitted a Rabbi-lead graduation exercise benediction which had asked God to help each attendee "strive to fulfill what You require of us all: to do justly, to love mercy, to walk humbly." In comparison,

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[3] Some of the organizations that are at the forefront of the most recent national character education movement include the Character Education Partnership, The Communitarian Network, Center for the Fourth and Fifth Rs, Character Education Institute, Jefferson Center for Character Education, Josephson Institute of Ethics, Institute for Global Ethics, Association for Moral Education, Center for the Advancement of Ethics and Character, and the Character Counts! Coalition.

Respondent has selectively made its public school available to youth development organizations the participants in which are trained to revere God; to serve God; to serve others; to develop meaningful values and ethics that will guide their actions; to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults; and to be, among other things, trustworthy, loyal, helpful, friendly, courteous, kind, obedient, and morally straight. In most cases, the participants in each of these groups wear the same type of uniform, learn the same history and dogma of their respective institution, participate in official ceremonies marking their passage into higher orders of merit, and engage in weekly meetings. The group leaders are thoroughly trained in the tenets of the their organization's moral or ethical religion and in child development techniques. The organizations have long-standing policies and procedures, a hierarchy of institutional officials and offices, and engage in professional fundraising efforts.

If this Court can strike down a once-a-year, one minute graduation benediction that merely asks God for help "to do justly, to love mercy, to walk humbly," then Respondent's policy of granting exclusive school facility access for the holding of weekly meetings of youth character and leadership development organizations that formally, pervasively, and professionally indoctrinate children in deeply held moral or ethical beliefs must meet with the same fate.

Such a determination cannot be avoided by arguing that such meetings are voluntary. In point of fact, the potential exists that parents who would otherwise enroll their children in the Christian Good News Club may choose to enroll their children in more convenient meetings of moral or ethical youth development organizations who have been granted access to the public school by Respondent. As this Court observed in *Sherbert v. Verner*, where one's "ineligibility for benefits derives solely from the practice of her religion," the

"pressure upon her to forgo that practice is unmistakable." Such a state of affairs "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning . . . the precepts of her religion in order to accept [them], on the other hand." 374 U.S. 398, 404 (1963).

Further potential for governmental indoctrination of children arises from the fact that the inherently religious nature of the moral or ethical belief systems of the "favored" youth development organizations makes it likely that group leaders will intentionally or inadvertently indoctrinate children. Because many of these leaders may have learned the foundational moral and ethical values of these groups in the context of traditional Judeo-Christian religious instruction and worship, there will be a significant likelihood for transference of some traditional religious teachings and practices, such as scripture lessons, songs, religious holiday celebrations, and forms of prayer, to the Boy Scout, Girl Scout, or 4-H Club setting.

Unlike a teacher who is permitted to provide secular remedial education to disadvantaged children in parochial schools (see *Agostini v. Felton*, 521 U.S. 203 (1997)) or a sign language interpreter who is permitted to work on behalf of a deaf student in a Roman Catholic high school (see *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993)), Boy Scout, Girl Scout, and 4-H Club group leaders indoctrinate group members in inherently religious moral and ethical beliefs concerning the very meaning of, and means to, a life lived in service to God and neighbors. This Court has stressed "the obvious observation that 'adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.'" *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. 2266 (2000) (quoting *Lee*, 505 U.S. at 593).

The exclusive public school access granted by Respondent for the moral and ethical training of children leaves the public with the impression that Respondent endorses such religious indoctrination.

(b) *The ascertainment by Respondent of the source and content of the deeply held moral, ethical, or religious beliefs of applicants under the Community Use Policy creates an excessive entanglement between government and religion.*

To assess entanglement, this Court looks to the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and religious authority. *Agostini*, 521 U.S. at 232-33; *Lemon v. Kurtzman*, 403 U.S. 602, 614-615 (1971).

The youth character and leadership development programs of organizations such as the Boy Scouts, Girl Scouts, and 4-H Club are inherently religious in that their ultimate goal is to indoctrinate children in deeply held moral and ethical beliefs that impose upon the participants a duty of conscience to do what is right and to refrain from doing what is wrong. Implementing the Community Use Policy in a manner that distinguishes between youth development organizations that train children in the context of moral or ethical beliefs and those that do so in the context of traditional religious beliefs excessively entangles Respondent with religion.

In examining the constitutionality of government aid programs, courts "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Welsh*, 398 U.S. at 357 (Harlan, J., opinion) (quoting *Walz v. Tax Commission*, 397 U.S. 664, 696 (1970) (Harlan, J., opinion)).

By granting access to its public school to organizations for the character and leadership development of youth, Respondent is furthering the legitimate secular purpose of training children for peaceful and productive democratic participation. However, there is no greater internal threat to peaceful and productive democratic participation than for government agencies to grant selective aid exclusively to those opinion-shaping youth organizations that conform in content and practices to that which government officials prescribe as "orthodox in politics, nationalism, religion, or other matters of opinion." *Barnette.*, 319 U.S. at 642. "As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." *Id.*, at 641.

The government "must be neutral in matters of religious theory, doctrine and practice" and "may not aid, foster, or promote one religion or religious theory against another." *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968).

The disparate treatment afforded under the Community Use Policy to different youth character and leadership organizations based on the religious nature of the source and content of their moral, ethical or religious beliefs completes a reversal of the roles and fortunes of the adherents to different religious theories of the parties in *Epperson* case. Thirty-two years ago, it was the adherents to a deeply held natural evolutionary belief system that were seeking access to public school facilities over the objections of those who believed deeply in a supernatural creationist theory of the origins of man. The evolutionists sought relief from this Court because the authorities deemed their beliefs not to be religious enough by traditional Christian standards.

In contrast, Christians seek relief from this Court because the authorities deem the source and content of their beliefs to be *too* religious by present secular standards. From the perspective of many Christians, what was once a vice is now a habit (and vice versa). In their view, while government aid flows in support of a "purely" moral and ethical *habit*, the "purely" religious *vice* goes begging. If Respondent is permitted to become excessively entangled in religion by denying the Good News Club because it adds an additional layer of Christian religious instruction and prayer to purely moral or ethical training, then evolutionary humanist Julian Huxley was prophetic when he wrote: "The time is ripe for the dethronement of gods from their dominant position in our interpretation of destiny, in favor of a naturalistic type of belief-system."[4] J. Huxley, *Religion Without Revelation*, 62 (1957 ed.)

In cases where a public school "regards its student clubs as a mechanism for defining and transmitting fundamental values," just as it is unconstitutional for the public school to grant public school access to a Christian club to the exclusion of other ideological organizations, it is unconstitutional to exclude a Christian club when public school access is granted to numerous other ideological organizations. *Westside Com-*

[4] Huxley, whose other titles relevant to the development of an evolutionary humanist religion include *Essays of a Humanist* (1961) and *The Humanist Frame* (1964), was the Director General of the United Nations Economic Security and Cultural Organization ("UNESCO") from 1946 to 1948. In a recent report, UNESCO officials called for a "holistic concept of education for a culture of peace," which would include "integrated comprehensive education covering human rights, democracy, international understanding, tolerance, non-violence, multiculturalism, and all other values conveyed through the school curriculum." *Final Report*, UNESCO Advisory Committee on Education for Peace Human Rights, Democracy, International Understanding and Tolerance, i (2000). The *Final Report* encourages the adaptation and dissemination of UNESCO teaching materials for peace, human rights, democracy, and tolerance.

munity Bd. of Ed. v. Mergens, 496 U.S. 226, 266-267 (1990) (Marshall, J., concurring).

The Equal Access Act, the extension of which to public secondary schools was the subject of *Mergens*, specifically prohibits discrimination against students groups on the "basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. 4071(a) (1984 version). It is instructive that, once a public high school opens its doors to the potential indoctrination of impressionable high school students, the Equal Access Act and this Court treat religious student groups and philosophical student groups as equals.

The Establishment Clause "prohibits misuse of secular government programs 'to impede the observation of one or all religions or . . . to discriminate invidiously between religions.'" *Gillette v. United States*, 401 U.S. 437, 462 (1971) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (Warren, C. J. opinion)). Because government discrimination between religions could have such a devastating effect on impressionable children, this Court has determined "we must remain sensitive, especially in our public schools, to the numerous subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others." *Mergens Bd. of Ed.*, 496 U.S. at 269 (Marshall, J., concurring) (quoting *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 627-628 (1989) (O'Connor, J., concurring)).

Respondent has become excessively entangled with religion by promoting moral or ethical "ideologies" regarding youth character and leadership development to the exclusion of a Christian religious "ideology" regarding the identical subject.

B. Granting access to youth development organizations for the training of children in deeply held moral or ethical beliefs while denying Petitioners equal access for the training of children in deeply held Christian religious beliefs tends to establish civic, scientific, evolutionary, ethical, or secular humanist form of a civic religion.

This Court has observed that "among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others." *Torcaso v. Watkins*, 367 U.S. 488, 496, fn. 11 (1961) citing *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (1957); *Fellowship of Humanity v. County of Alameda*, 315 P.2d 394 (1957).

Respondent's failure to extend community use of a school facility to Petitioners has the effect of providing natural moral or ethical humanist religions with a competitive advantage over supernatural religions in the formation of children in ultimate values deemed essential to peaceful and productive democratic participation. The continuation of such a system "encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise" of a purely moral or ethical nature. *Santa Fe Independent School Dist.*, 530 U.S., at 319, 120 S. Ct. at 2283.

Throughout American history, there have been attempts to advance natural moral or ethical belief systems as the foundation for a state-sponsored civic religion.[5] In most

[5] Thomas Jefferson wrote his own version of the Bible in an attempt to rescue the "diamond" of primitive, Unitarian Christianity from the "dunghill" of Trinitarian Christianity. In his opinion, "the innocent and genuine character" of Jesus needed to be rescued "from the imputation of imposture, which has resulted from artificial systems, invented by ultra-Christian sects, unauthorized by a single word ever uttered by Him." According to Jefferson, these "artificial systems" included:

> "The immaculate conception of Jesus, His deification, the creation of the world by Him, His miraculous powers, His resurrection and visible ascension, His corporeal presence in the Eucharist, the Trinity, original sin, atonement, regeneration, election, orders of Hierarchy, etc."

T. Jefferson, "Letter to William Short" (October 31, 1819) in *The Life and Selected Writings of Thomas Jefferson*, 633 (1993).

instances, these various forms of humanist religions have been developed out of pedagogical concern for the training of young Americans to become willing and able participants in the American democratic system.[6]

During and for the two decades following World War I, the focus of the proposed civic religion shifted from a form of deist humanism to a civic humanism that indoctrinated immigrants, particularly German and Irish Catholics, in Protestant-American morals and ethics. Youth development organizations such as the Boy Scouts of America and the YMCA played an important role in this indoctrination process.[7]

[6] Horace Kallen provides an explanation of the development of humanism through its various stages. Kallen describes the essential features of Rousseau and Jefferson's deistic humanism; Auguste Comte's positive humanism; Matthew Arnold and Irving Babbitt's new humanism; John Dewey's scientific humanism; Felix Adler's ethical humanism; Julian Huxley's evolutionary humanism; and Kallen's secular humanism. H. Kallen, *Secularism is the Will of God*, 198-218 (1954).

[7] Boy Scouts of America historian David MacLeod has explained that:

> If Boy Scout leaders as a group had a level of ultimate concern, it was Americanism rather than religious faith, for Protestants had long identified their values with Americanism, and the priorities were easily reversed. . . . The BSA, in other words, upheld what recent scholars have labeled a "civil religion"—not as a prophetic faith standing in judgment upon actual American practices but as a

Civic humanism reached its zenith as a state-sponsored civic religion in the years leading up to and covering the first few years of World War II. American children were indoctrinated in democratic values like honesty, sacrifice, respect for God, love of Country, duty, patriotism, trust, loyalty, and freedom—all of which were viewed as essential ingredients in the formation of good citizens. The American flag was seen as the embodiment of these democratic virtues and it was the successful contest to West Virginia's compulsory flag salute statute in this Court's *Barnette* decision that was largely responsible for the decline of civic humanism as America's official civic religion.

In 1934, one of America's leading education philosophers, John Dewey, attempted to move beyond a normative civic humanism to advocate a "common faith" based on "distinctively religious values inherent in natural experience." J. Dewey, *A Common Faith*, 20. In Dewey's scientific humanist[8] view, the development and practice of such a natural, common faith would help undermine the "claim on the part of the religions to possess a monopoly of ideals and of the supernatural means by which alone, it is alleged, they can be furthered." *Id.* at 19. Dewey felt that his "common faith" could serve as a civic religion because it emancipated the religious qualities and values inherent in human experience from any dependency on the "God of theism" or "the whole notion of special truths." *Id.* at 23.

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celebration of the American way of life, in which a decent measure of religiosity plays an important but subordinate role.

D. MacLeod, *Building Character in the American Boy: The Boy Scouts, YMCA, and Their Forerunners, 1870-1920*, 176 (1983).

[8] "There is but one sure road of access to truth—the road of patient, cooperative inquiry operating by means of observation, experiment, record and controlled reflection." J. Dewey, *A Common Faith*, 23 (1934).

Dewey rejected "religion" as signifying "a special body of beliefs and practices having some kind of institutional organization," in favor of "religious" as denoting "attitudes that may be taken toward every object and every proposed end or ideal." *Id.* at 8. The present-day distinction made by Respondents between the "discussion of religious material through religious instruction and prayer," for which access was denied, and the "discussion of secular subjects from a religious viewpoint," for which access was granted, has the effect of establishing Dewey's scientific humanism as a civic religion.

During the first half of the twentieth century, practitioners of Felix Adler's Ethical Culture religion[9] were rejecting Dewey's practical scientific humanism in favor of a more idealistic ethical humanism the spiritual ideal of which was to "seek to elicit the best in others, and thereby you will bring to light the best that is in yourself." F. Adler, *Reconstruction of the Spiritual Ideal*, 56 (1923).

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[9] The American Ethical Union ("AEU") has a Statement of Purpose that includes the following definition of Ethical Culture:

> Ethical Culture is a humanistic religious and educational movement inspired by the ideal that the supreme aim of human life is working to create a more humane society.
>
> The AEU affirms and promotes the following principles which it considers to be integral to the Ethical Movement:
>
> 1. Every person has inherent worth; each person is unique.
> 2. It is our responsibility to improve the quality of life for ourselves and others.
> 3. Ethics are derived from human experience.
> 4. Life is sacred, interrelated and interdependent.

The American Ethical Union's State of Purpose and the four principles of the Ethical Movement are set forth in their entirety at http://www.ethicalculture.org/aeuves/purpose1.html and http://www.ethicalculture.org/aeuves/hist1.html

In the opinion of David Muzzey, an early advocate of the Ethical Culture religion, what the world needed was a "religion of humanity,"[10] which could be a "force for the redemption of the world from the hell of inhumanity into which it has fallen," if only churches would "abandon their outdated creeds and devote all their energies to the understanding and improvement of the nature of man and his institutions." D. Muzzey, *Ethics as a Religion*, 48 (1951). A personal God is not a condition for the construction of an ethical humanist religion along the lines of Ethical Culture since "instead of positing a personal God whose existence man can neither prove nor disprove, the ethical concept is founded on human experience." *Id.* at 95 (quoted in *Seeger*, 380 U.S. at 183).

By the early 1960s, Muzzey's ethical humanist civic religion model was considered too normative and unrealistic for use in youth character development in a modern and uncertain world. In 1963, Protestant theologian Paul Tillich, proposed that "the fundamental concept of religion is the state of being grasped by an ultimate concern." P. Tillich, *Morality and Beyond*, 30 (1963). For Tillich, love, not the particular symbols of thought and action of any traditional religion, should be the ultimate concern of separated persons who desire to enter into a unity community. In Tillich's view, in order to speak of one's ultimate concern, perhaps one "must forget everything traditional that [one has] learned about

[10] The French social scientist, Auguste Comte, was the first to call for the replacement of the religions of mankind by a Religion of Humanity. In Comte's religion, "Humanity would be the true God, the divine Whole that every one of its individual parts must learn to love and obey with a total faith." H. Kallen, *Secularization is the Will of God*, 202. The Bible of the Religion of Humanity consisted of works of poetry and fiction, science, history, philosophy and religion determined by Comte as apt to the propagation of the faith. *See* A. Comte, *The Catechism of Positive Religion* (1858).

God." P. Tillich, *The Shaking of the Foundations*, 57 (1948) (quoted in *Seeger*, 380 U.S. at 187).

Tillich, and the "death of God" advocates of secular humanism that followed in his path such as Bishop John A. T. Robinson,[11] Paul van Buren,[12] and Harvey Cox,[13] abandoned any notion of a normative civic religion in an American culture of the 1960s. For those who were being "honest" to God by trusting "the world, not God, to be our need fulfiller and problem solver," moral, ethical, and religious norms were to evolve solely in the relative context of one's worldly relations with their neighbor in the "secular city." J. E. Dirks, "The Death of God Theologies Today," in *Radical Theology and the Death of God*, 40 (1966).

One commentator on the movement to secularize Christianity described an endgame that is manifested in Respondent's preferential treatment of youth organizations that form children using a purely moral or ethical belief system: "Secular theology, in effect, tells us: The world for four centuries has been removing the shackles of superstition, religion, and quasi-religion. In the future it will purge itself further and may complete the purge. At the end of the process is a kind of serene, carefree agnostic who cares for others." M. Marty, "Does Secular Theology Have a Future?" in *The Great Ideas Today* (1967).

Respondent has penalized Petitioner for being too Christian in the moral formation of youth. Petitioner has dared to discuss Christian Gospel morals and values through Christian religious material (i.e. Bible lessons) and prayer. Meanwhile, Respondent has rewarded the Boy Scouts, Girl Scouts, and 4-H Club for discussing these same Gospel values from a

[11] J. Robinson, *Honest to God* (1963).

[12] P. van Buren, *The Secular Meaning of the Gospel* (1963).

[13] H. Cox, *The Secular City* (1965).

"secularized" religious standpoint. This disparate treatment affords advocates of secularized Christianity an unconstitutional competitive advantage for recruiting families to a faith that is an anathema to orthodox Christianity.

During the past forty years, national and international organizations have been created in an attempt to bring together followers of the different moral and ethical belief systems including scientific humanism, ethical humanism, and secular humanism.[14] The institutional presence of these humanist organizations in national and international religious affairs, including youth development programs, heightens the importance of the need to arrive at an equitable First Amendment policy- a policy that does not place traditional religions in the position of having to dilute the religiosity of their youth outreach efforts in order to compete for available state aid.

Ultimately, the success of any of the various humanist religions depends on the ability of its adherents to indoctrinate rising generations of potential followers in deeply held moral or ethical beliefs. Paul Kurtz, a co-president of the International Humanist and Ethical Union admits that "if humanism is to have any long-range impact on society, it must cultivate moral awareness by means of ethical education," an agenda that "depends on the schools." P. Kurtz, *Living Without Religion: Eupraxophy*, 139 (1994).

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[14] These organizations include the American Ethical Union, the Fellowship of Religious Humanists, the American Humanist Association, and Humanistic Judaism. These four organizations are members of an alliance called the North American Committee on Humanism which runs the Humanist Institute, publishes an annual journal called *Humanist Today*, holds annual meetings at which scholarly addresses are presented, seminars are held and business is conducted, and periodically mails out a newsletter to its members. The Humanist Institute offers a three-year graduate degree program that provides certification as a professional humanist leader. M. Olds, *American Religious Humanism* 190, 191 (1996).

The principals and values of Kurtz' ethical education agenda include character training and the cultivation of a compassionate regard for the needs of others. Thus, Kurtz' secular humanism, as do Jefferson's civic humanism, Dewey's scientific humanism, Huxley's evolutionary humanism, and Muzzey's ethical humanism, contemplates using the student attitude and behavior shaping capacities of the public schools to indoctrinate children in deeply held moral or ethical beliefs that are contrary Petitioners' deeply held Christian religious beliefs.

This Court has acknowledged the possibility that a civic religion constructed from the "common aspects of religions" might advance "the sense of community and purpose sought by all decent societies." *Lee*, 505 U.S. at 589-590. Nevertheless, this Court has rejected "the suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." *Id.*, at 590. Although a policy that grants preferential access to youth development organizations that teach children purely moral or ethical beliefs may be more of a "civic or nonsectarian" nature, such a policy "does not lessen the isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront." *Santa Fe Independent School Dist.*, 530 U.S. at 312, 120 S.Ct. at 2277 (quoting *Lee*, 505 U.S., at 594).

C. In order to avoid an Establishment Clause violation, absent the provision of a legitimate threat to the health and safety of children, Respondents must grant public school access to all youth development organizations that train children to adopt deeply held moral, ethical, or religious beliefs about what is right and wrong.

Where a statute or government policy is defective because of underinclusion, a court may declare it a nullity and order

that its benefits not extend to the intended class, or it may extend coverage to include those who are aggrieved by exclusion. *Welsh*, 398 at 361.

In the present case, instead of voiding the entire Community Use Policy because it engages in "religious gerrymandering" in favor of deeply held *moral* or *ethical* beliefs, this Court should require an expansion of the Community Use Policy to include organizations that provide youth character and leadership training in the context of deeply held *religious* beliefs. In this way, neutrality of government aid can be ensured. Further, whether children are indoctrinated in the deeply held moral, ethical, or religious beliefs of a particular youth development program would depend solely on the voluntary, private, and independent decisions of parents who enroll their children in the program.

As recently stated by this Court:

> ". . . the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient furthers the government's secular purpose. . . . If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what they constitutional violation would be. The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to their children."

Mitchell v. Helms, ___ U.S. ___, 120 S. Ct. 2530, 2551 (2000).

These principles of neutrality and private choice can be applied to eliminate the indoctrination that is attributable to

the Respondents under the present formulation of the Community Use Policy. By offering assistance to recipients who offer moral, ethical, *and* religious youth development programs, Respondents cannot be thought responsible for any particular indoctrination. *Mitchell v. Helms*, 120 at 2256-57 Such government neutrality is further ensured by the fact that "numerous private choices, rather than the single choice of a government" will determine the granting of public school facility access pursuant to neutral eligibility criteria. *Id.* at 2541.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

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